85-790

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM H. CUDDY,
Petitioner,

v.

GERALD P. CARMEN, *Administrator,*
GENERAL SERVICES ADMINISTRATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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60 pp

THE QUESTION PRESENTED FOR REVIEW

Did the General Services Administration discriminate against the plaintiff, Cuddy, in refusing to hire him because of his age, which he contends is in direct and deliberate violation of the Age Discrimination in Employment Act (A.D.E.A.) 29 U.S.C. 622 et seq (1976 and Supp. IV 1980)

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William H. Cuddy, Pro Se, petitions for a Writ of Certiorari to review the Judgement of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The second opinion of the Court of Appeals, May 21, 1985 (App. *infra*, 1A) affirming the Judgement of the District Court. Judgement of the District Court after reversal and remand, February 6, 1984 (App. *infra*, 2A). The first opinion of the Court of Appeals on reversal and

remand, December 3, 1982 (App. *infra*, 3A).

JURISDICTION

The Judgement of the Court of Appeals was entered on May 21, 1985. (Appendix *infra* 4A)

A petition for a re-hearing was denied August 13, 1985. (Appendix *infra* 5A)

Suggestion for a re-hearing *en banc* was denied August 13, 1985 (Appendix *infra* 6A)

REASON FOR GRANTING THE PETITION

1. The Plaintiff was not given a fair chance to prove the reason given by the Defense as being pretextual. The reasons given were many and varied — and after the fact — making it impossible for the Plaintiff to focus in on one clear reason.

The purpose of placing the burden on the Defense (a legitimate reason for not hiring the Plaintiff) is simultaneously to meet the Plaintiff's prima facie case by framing the factual reason with sufficient clarity so that the Plaintiff will have a *full* and *fair* opportunity to demonstrate pretext. No. 84-5132 Cuddy v. Carmen at Appendix 1A (Texas Department of Community Affairs v. Burdine 450 U.S. 255-256 (1973).

The Court of Appeals may have been guided to a decision by the Supreme Court against the Plaintiff by its ruling in Anderson v. City of Bessemer City NC U.S. at 105 Supreme Court at 1512 (1985).

> "If the District Court's account of the evidence is plausable in light of the record reviewed in its entirety *The Court of Appeals may not reverse* even though convinced, had it been sitting as the trier of fact, it would have weighed the evidence differently. (No. 84-5132 at 8 Cuddy v. Carmen Appendix 1A.

The Plaintiff Cuddy challenges the interpretation of the clearly erroneous standard (see Fed. R. Civ. P. 52(A)) which is condoned by the Appeals and possible misinterpretation of Supreme Court Ruling as it tends to perpetuate the possibility of violating the A.D.E.A. by making it possible for industry and the U.S. Government to cloud the issues (reverting to vague and multiple reasons for not hiring the older but certified candidate.) (Supreme Court 1504, 1511 (1985). (No. 84-5132 Cuddy v. Carmen at 8) Pullman Stannard v. Swint 456 US 273 (1982).

STATEMENT

In all of its correspondence to Cuddy previous to his suit of the General Services Department (GSA) the GSA claimed that Cuddy was equally considered with all of the candidates, but when Cuddy produced bona fide evidence that in the same time frame of Cuddy's application that over 140 jobs were filled in GSA but not by anyone from the outside in the Senior Level Group (GS-13 and above) and none were filled by any applicant over 40 years of age.

When Cuddy brought this to the attention of the E.E.O. Director and the GSA officials and suggested that this was a violation of the Age Discrimination in Employment Act (A.D.E.A.) the GSA changed their original assertion that "Cuddy was equally considered for the position" to "Cuddy may not have been considered as they *did not* see his application".

Cuddy took this reasoning of the GSA as being the main reason for GSA's non-selection of Cuddy and disproved it in his brief for his first appeal 81-1211, Cuddy v. Carmen (Point No. 1 of his argument, pages 10 thru 12).

GSA accepted the fact that Cuddy had proved a prima facie case under the Age Discrimination in Employment Act (Defendant's memorandum of fact and conclusions of law, Fact #5, page 8).

1. He was between 40 and 70 years of age and therefore under the protection of the Act.

2. He was certified for the position.

3. He was not hired.

4. He was disadvantaged in favor of a younger person not in the protected age group of 40 to 70. See Sutton v. Atlantic Richfield Company 646 Fed 2D 407 (9th Cir. 1981), Loeb v. Textron, Inc. 600 Fed 2D 1003 (1st Cir 1979), McDonnell Douglas Corp. v. Green 411 US 792 (Analogous elements under Title VII).

Once a prima facie case has been established the employer has the burden of producing evidence tending to show that the applicant was denied employment for a legitimate, non-discriminatory reason.

Cuddy proceeded in his brief to the Court of Appeals to discredit the GSA's reason that the hiring supervisor "did not see Cuddy's application," which up to now was the main reason of GSA.

1) Further, the hiring supervisor did admit that he may have seen the application of Cuddy.[1]

2) The hiring supervisor did admit to being aware of Cuddy's age (Plaintiff's exhibit #8 at trial).

3) The hiring supervisor openly conceded that "age is a *minor consideration* to selection, but is not the sole motivating factor.[2]

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[1]Cuddy's Appendix to Brief No. 81-1211 at 17 and plaintiff's exhibit #5 at trial).

[2]Cuddy's Appendix to Brief No. 81-1211 at 23-24.

4) Mr. Joseph Daniel, Director of GSA's Equal Opportunity Division, *did not agree* with the decision of the original hearing because he said, "age was in fact a selection factor."[3]

The judgement of the District Court was reversed and the case remanded for further proceedings (Appendix *infra* 3A at 15).

Cuddy, not being that familiar with the legal angles and acting pro se, reasoned that it was enough to discredit this pretextual reason of GSA ("Cuddy was not considered") and that should have sufficed according to *his* interpretation of the A.D.E.A.

The judge in the Civil Court on remand ruled that the GSA was not clearly erroneous in its decision not to hire Cuddy (Appendix *infra* 1A at 19).

Cuddy appealed the Lower Court's decision again, 84-5132 Cuddy v. Carmen. This appeal was argued February 26, 1985.

Cuddy argued in his appeal in the following manner:

LOWER COURT ERRED

The Lower Court on remand erred as it did not consider the evidence presented to it for a finding of facts by the plaintiff Cuddy. Therefore after Cuddy proved a prima facie case, which the defense admitted was true, the facts proved that the non-selection of Cuddy was clearly erroneous.

MOTIVE WAS DISCRIMINATORY IN INTENT

The GSA used, but failed to apply the clearly erroneous

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[3]Cuddy's Appendix to Brief No. 81-1211 at 22A.

standard Rule 52 (a) Federal Rules of Civil Procedure as they *pre-selected* the younger candidate from within house which is discriminatory in intent.

GSA'S NON SELECTION OF THE PLAINTIFF-APPELLANT, CUDDY, WAS CLEARLY ERRONEOUS

Cuddy tried to prove in his argument that the reasons given by GSA which were many and *ambiguous,* were a *sham* and therefore a pretext to hide the ultimate reason for their decision which was in violation of Age Discrimination in Employment Act (A.D.E.A.).[4]

IMPORTANCE OF THIS ISSUE TO THE UNITED STATES GOVERNMENT AND THE WELFARE OF POSTERITY IN GENERAL.

The United States maintains a system whereby the Civil Service Commission, when the need arises, can pick the most highly qualified men and women from the nation's pool of highly qualified professional people.

At the same time, these same people need the available government positions in times of recession and in the general downturn of the economy in certain industries.

(NOTE): This latter reason is probably what influences Cuddy not to give up on this cause. For instance, *one* of the facts that Cuddy presented was a list of approximately 140 jobs that were filled by GSA in the same time span from March 1 to July 1, 1975, which inferred a policy of discriminatory intent, as not even *one* was filled by a candidate on the Civil Service List of highly qualified candidates from outside the government.

Now, like Cuddy, there were other men who also were

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[4]Age Discrimination in Employment Act of 1967, 29 USC 621 et seq (1968) as amended by the Fair Labor Standards of 1974 29 USC 633 (a) 1974.

searching for positions in the recession of 1974-75. Several of these men in their early 50's were overjoyed because they qualified as engineers and supervisors in industry and on the Civil Service Commission's List of Senior Level Candidates. But these men were *out of work*. With homes and mortgages to pay - with children in college and the usual financial responsibilities of the American family man there was hope of finding a job. But, alas, the list of jobs for which they were qualified in the General Services Administration were filled in the senior level by candidates from within. (Not *one* job was filled from the outside with a candidate over the age of 40.)

Therefore, even these acquaintances who are not part of Cuddy's case (but were also affected by age discrimination) drives Cuddy to rectify a wrong that is being perpetuated within the General Services Administration from before the amendment by the Department of Labor in 1974 which brought all of the Government agencies, including GSA, under the protection of the A.D.E.A. (A great loss to the United States Government and worse, a great loss to the American family man and his posterity).

COURT OF APPEALS MAY HAVE MISINTERPRETED REAL REASON FOR DEFENSE'S ACTION

With all due respect to the rationale of the Court of Appeals, Cuddy finds that he must address himself to what he considers a serious misinterpretation of what appears somewhat like the defense successfully carrying the burden of producing evidence of non-discriminatory intent but not really doing so. (Cuddy v. Carmen No. 84-5132) A 13.

DISTRICT COURT FINDINGS

Albert Treichel testified that the plaintiff's experience was not oriented towards the work of the V.O.B. (Voice Operations Branch). Several questions must be asked at this point for such a reason — as it seems to tip the scales in the

eyes of the Court of Appeals.

1. In as much as GSA relied heavily on their claim that the Civil Service List of Eligibles was lost and that Cuddy was never considered; how could Treichel arrive at the conclusion that Cuddy's experience was not oriented towards the Voice Operations Bureau if he didn't consider him? The Civil Service Commission certified him as being *highly* and totally qualified for the position.

2. As V.O.B. was handling the 10/7 conversion, he, Treichel, needed someone to keep up with daily activities. If this was true and a valid reason, and not a pretext, why did Treichel request another candidate from the Civil Service Commission? He knew Daley, the selectee, would be with his group for many months. See Note 23A - Trial Transcript p. 194, lines 2-5. Further, see Plaintiff's findings of fact #20 pp. 10-11, Note #24).

3. Who did finally take care of the daily activities if the selectee was involved with managing the 10/7? The appellant, Cuddy, contends that the GSA hired no one since the only candidate available was Cuddy, who had proved a prima facie case. Cuddy further contends that this in itself is pretextual and is a cover up of deliberate discriminatory intent. (When the candidate is older and the intent is age discrimination, they shift from within and close out the position.)

ARGUMENT FOR THE PLAINTIFF

The plaintiff, Cuddy, contends that the GSA's decision not to hire Cuddy was *clearly* erroneous. This is in violation of Rule 52 (a) of the Federal Rules of Civil Procedure. Cuddy need only prove that age was a determining factor since he proved and the defense agreed, that he established a prima facie case. That is: 1) He was in the protected age group, 40-70; 2) He was certified by the government as being highly qualified; 3) He did not get the position; and 4)

He was disadvantaged by a younger person not in the protected age group. Although the burden now shifted to the defense, they failed to *"articulate"* a non-discriminatory reason for his non-selection.

"Articulate" means show or prove. See Loeb v. Textron (NC 600 Fed 2D 1003 (1979 at 1025 Note 1. In vacating and remanding Sweeny 569 Fed 2D 169, the Supreme Court observed that the words such as "articulate", "show," and "prove" may have more or less the same meaning.

In this case, the GSA showed or proved nothing in a series of lame excuses.

First GSA claimed they never saw the Civil Service List of Eligibles with Cuddy's name on it. So how could they discriminate against him? This was shown to be in error as Schoenfelder testified that he gave the list to the hiring supervisor.[5] Therefore it is merely a weak excuse. It is not an *"articulated"* reason.

The primary reason given by GSA, when confronted with the list of candidates that were hired, was that they reverted from their solid excuse "Cuddy was *'equally'* considered." See letter from Gray, Plaintiff's Exhibit #3. App. 13. Two opposing answers to the same question add up to subterfuge and pretext.

One by one Cuddy negated the reasons given by GSA as pretext. Then, when caught in the trap of two reasons (we did) and (we didn't) consider Cuddy, GSA used the reason after the fact, "we wouldn't have hired him if we did see his credentials." (All pretextual, indeed).

The plaintiff need not — once having established a prima facie case — canvass the entire waterfront and eliminate

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[5]Plaintiff's Exhibit #4, transcript of Mr. Schoenfelder, the Personnel Management Specialist.

every other possible motive for the non-hiring/discharge. He must simply meet the defendant's alleged valid reason by showing it to be a pretext — It places the plaintiff under an impermissable handicap.[6]

GSA requested of the Civil Service Commission candidates from outside the government to fill the position of Communications Specialist. When the highest qualified candidate resulted in Cuddy, the plaintiff-appellant, GSA, filled the position with a candidate from within who was already on the job is the same as closing out the position to outside candidates who were certified by the Civil Service Commission. Not filling th job with the candidate, Cuddy, who established (and GSA agreed with) a prima facie case, is for all intents and purposes saying that if we have to take a candidate over forty, we won't take anyone.

The appellant, Cuddy, presents the question to GSA: Why go to the trouble of requesting of the Civil Service Commission a candidate from the outside if they already had their man on the job on the inside? Cuddy contends that this action of closing the door on the qualified and government-certified candidate shows clearly the motivation by GSA (to perpetuate its Pre-Act discrimination which took place before 1974 and which they did not contest when it was charged in the administrative phase of this A.D.E.A. case.)

The appellant, Cuddy, tried to prove with indirect evidence[7] that GSA's explanations and inconsistancies more than likely are a sham and a pretext to hide discrimination.

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[6]Loeb v. Textron 600 Fed 2D, 1003 (1979) at 1025 III.

[7]Cuddy v. Carmen 694 Fed 2D at 859.

I. DISCREPENCIES IN GSA EXPLANATIONS ARE MANY:

a) The hiring supervisor never saw the Civil Service list with Cuddy's name on it. Therefore he did not consider him — therefore he could not have discriminated against him.[8]

b) If Treichel did not consider Cuddy, how could he have said that Daley, the selectee, was better qualified?[9]

c) If Treichel did not consider Cuddy, how could he have also said that the selected candidate was more experienced with the GSA's specialized type of operations?[10]

II. FIRST DISCREPENCY WAS MAJOR INFERENCE OF "AGE DISCRIMINATION".

From the time of Cuddy's complaint to the E.E.O. Office, September 12, 1975, all the communications from GSA insisted that Cuddy was equally considered with all candidates but was non-selected.[11]

After Cuddy notified the E.E.O. Office of the 140 jobs which were available from March 1, 1975 through July 1, 1975, and that on investigation it was found that nine positions were filled, for which Cuddy qualified, (Communications Specialist GS-13) but that *none* of the 140 senior level positions were filled by candidates over

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[8]Defendant's Finding of Fact and Conclusions of Law (Fact #9).

[9]Defendant's Finding of Fact and Conclusions of Law (Part III at 12).

[10]Defendant's Finding of Fact and Conclusions of Law (fact #6).

[11]Plaintiff's Exhibit #3 at trial. (Mrs. Gray, Personnel Director's letter).

40 from the outside, the GSA changed their reasons for not hiring Cuddy.[12]

GSA now changed their reason to "Cuddy was not considered at all."[13] This first change of reason and the first inconsistency took place immediately after GSA was confronted with the evidence of discrimination and was a major factor in his accusation of the GSA's violation of the A.D.E.A. (Age Discrimination in Employment Act.)

SUMMATION

Appeals Court allowed defense to side-step answer to pretextual reason which is against previous court rulings.[13]

2. The District Court in this case appears to have uncritically accepted findings prepared with judicial guidance by the defense.

3. The District Court misapprehended and misapplied the clearly erroneous standard.

4. The District Court's crucial findings were clearly erroneous. (The finding that the selected candidate was more qualified.) The hiring supervisor said that Daley was familiar with the specialized nature of the GSA's telecommunications. He didn't "articulate" a reason, he merely made the statement after the fact.

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[12]Letter from Mr. Joseph Daniels, Director E.E.O. Division dated July 14, 1977. Exhibit (G) at original hearing, which is a list of positions filled in GSA from March 1, 1975 to July 1, 1975.

[13]Cuddy v. Carmen No. 84-5132 Page 18, total page. Note [15]. Also note [16]. Appendix B. — See also Note 6 *supra* — (the plaintiff must simply meet the defense's alleged valid reason by showing it to be a pretext. To meet every other possible motive for not hiring, places the plaintiff under an impermissable handicap. (Loeb v. Textron 600 Fed 2D, 1003 (1979) at 1025 III.

This Act of Discriminatory motive associated with all of the other evidence that age made a difference shown in the appellant's Finding of Facts, 15 through 19 which included the hiring supervisor saying:

a) Age is a minor consideration to hiring;

b) The E.E.O Director, Mr. Daniels, comment (age in fact was a selection factor);

c) Hiring supervisor saying, "there was a mandate from management not to hire people who are going to retire in a few years", and

d) The documented evidence that the GSA had an ongoing policy of age discrimination going on within the agency.

The appellant Cuddy concludes that he should have prevailed because he established a prima facie case (admitted by the defense) and the tower of reasons given by GSA, were all pretexual in nature to hide GSA's motivation to intentionally violate the Age Discrimination Act (A.D.E.A.) and perpetuate its pre-act discrimination which was rampant before the Act was amended in 1974 to include all government agencies. (Age Discrimination Act of 1967, 29 U.S.C. et seq (1968) as amended by the Fair Labor and Standards of 1974, 29 U.S.C. 633(a) 1974. The appellant Cuddy contends all of the evidence shows that GSA was clearly erroneous in its decision not to hire Cuddy. (Federal Civil Procedure rule 52 (a)) and that the Lower Court erred in its judgement. The Court of Appeals condones this judgement in its opinion No. 84 5132 Cuddy v. Carmen May 21, 1985.

CONCLUSION

The petition for the writ of certiorari should be granted.

Respectfully submitted,

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October, 1985

APPENDICES

Appendix 1A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5132

WILLIAM H. CUDDY, APPELLANT

v.

GERALD P. CARMEN, Administrator,
General Services Administration

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 79-1249)

Argued February 26, 1985

Decided May 21, 1985

William H. Cuddy, pro se.

Diane M. Sullivan, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, and *Royce C. Lamberth*, *R. Craig Lawrence*, and *Michael J. Ryan*, Assistant United States Attorneys, were on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The

Before ROBINSON, *Chief Judge*, and WRIGHT and WALD, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: William H. Cuddy, the appellant here, sued the General Services Administration (GSA), alleging that its failure to hire him resulted from age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* (1982). In the original District Court proceeding a jury rendered judgment for GSA. Cuddy then appealed. This court vacated the verdict, holding that a jury trial was improper in an ADEA action against the federal government and clarifying the standard for liability in ADEA actions. *See Cuddy v. Carmen*, 694 F.2d 853 (D.C. Cir. 1982). We remanded the case to the District Court for additional proceedings—specifically the entry of findings of fact and conclusions of law by the District Court itself. On remand the District Court, relying entirely on the original trial evidence, again held for GSA. Cuddy now appeals for the second time.

The sole issue on this appeal is whether the District Court's findings of fact and overall finding that GSA did not discriminate against Cuddy on the basis of his age are clearly erroneous. If they are clearly erroneous, this court must reverse. In this case, however, although the evidence supporting the District Court's subsidiary and ultimate factual findings leaves much to be desired, we conclude that the critical findings are not clearly erroneous. Consequently, we affirm the judgment of the District Court.

I. FACTUAL BACKGROUND [1]

Cuddy was employed for many years by a private telephone company in Connecticut. In the mid-1960's, anticipating his mandatory retirement some years later (at

[1] *See also Cuddy v. Carmen*, 694 F.2d 853, 854-856 (D.C. Cir. 1982) (summarizing factual background).

age 65 in 1976), he filed an employment application with the federal government. In 1966 he was certified by the Civil Service Commission (CSC) for government employment in a GS-13 (senior level) communications specialist position. Having been certified for government employment, he maintained his eligibility over the following years. During those years he also applied (unsuccessfully) for advertised government jobs when he was eligible to fill them.[2]

In 1975 Cuddy remained eligible for GS-13 positions. In February of that year the Voice Operations Branch (VOB) of the Automated Data and Telecommunication Service (ADTS) of GSA advertised a GS-13 communications specialist position for which Cuddy was qualified. Having learned of this advertisement, Cuddy diligently attempted to ensure that he would be considered for the position. First, he completed the necessary official tasks. (For example, he returned the certification, indicating his continued interest in the position.) This ensured that he would be included on the CSC certificate of non-government employees who were eligible for the position, which was sent to the GSA selecting official. In addition, Cuddy visited Robert Schoenfelder, the GSA personnel employee in charge of handling Civil Service Com-

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[2] For a non-government employee to obtain a government job, he or she must take the CSC examination and qualify for that job. In contrast, government employees may apply directly for another government job simply by submitting their applications. These applications are apparently normally screened by a merit promotions panel to select those applicants who are best qualified for the position.

It is possible for a government official to consider both government and non-government employees for a particular job opening. Where the job is advertised both within and without the government, this dual consideration is accomplished based on the concurrent submission of a "certificate of eligibles" (qualified non-government employees) from CSC and of the list of qualified in-house candidates from the merit promotions panel.

mission candidates, and Albert Treichel, the GSA supervisor who would actually select the candidate to fill the position. The purpose of these visits was apparently to acquaint the GSA officials with his interest in and his qualifications for the job and to make sure that his application did not fall through any bureaucratic cracks. In spite of his perseverance, however, Cuddy was not selected for the job. Instead, a GSA employee, Robert Daley (aged 37) was selected.

After exhausting his administrative remedies, Cuddy brought suit against GSA in the District Court, asserting that GSA's failure to hire him had been motivated by discrimination against him due to his age. Following the presentation of Cuddy's case-in-chief, the District Court, applying the three-part evidentiary structure of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), ruled that Cuddy had established a *prima facie* case of age discrimination and denied GSA's motion for a directed verdict. *See* Transcript of Trial Proceedings (Tr.) at 146. The introduction of evidence by GSA and of rebuttal evidence by Cuddy then proceeded, and the case finally went to a jury. In instructing the jury, the District Court stated that the jury was to return a verdict for the plaintiff only if it found that age was *the* determining factor in GSA's decision not to hire Cuddy for the position. *See Cuddy, supra*, 694 F.2d at 855-856. The jury returned a verdict for GSA, and Cuddy appealed.

On appeal, we vacated the jury verdict and remanded the case to the District Court. We noted that a jury trial was inappropriate in an ADEA case against a federal government defendant. *See id.* at 859. Consequently, we remanded to the District Court for that court to make findings of fact and conclusions of law. *See id.* at 860. We also noted that the proper standard for liability under the ADEA was that age be *a* determining factor in

the employment decision; it need not be *the* determining factor in the decision. *See id.* at 857-858 n.22.

On remand, the District Court entered findings of fact and conclusions of law in accordance with our instructions. Based on its findings, the District Court again entered judgment in favor of GSA. *See Cuddy v. Carmen*, 580 F.Supp. 788 (D. D.C. 1984). Cuddy now appeals that judgment to this court, contending that the District Court's findings were clearly erroneous.

II. Legal Framework and Standard of Review

It is well established in this circuit that we will apply to ADEA cases the scheme for allocating evidentiary burdens that has evolved in the context of Title VII discrimination cases. *See, e.g., Krodel v. Young*, 748 F.2d 701, 705 (D.C. Cir. 1984) (citing cases); *Cuddy, supra*, 694 F.2d at 856-857. This scheme allocates the burden of presenting the relevant evidence between the plaintiff and the defendant. First, the plaintiff must present a *prima facie* case of discrimination. In failure-to-hire or failure-to-promote cases, this consists of a showing that (1) the plaintiff belongs to the group protected by the relevant statute (here the group of persons between the ages of 40 and 70); (2) the plaintiff was qualified for the position in question; (3) the plaintiff was not hired/promoted; and (4) a person not of the protected group was selected (here a person below the age of 40). *See Krodel, supra*, 748 F.2d at 706.[3]

Once the plaintiff has presented this *prima facie* case, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell, supra*, 411 U.S. at 802. This re-

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[3] Following this four-part formula is not the only way in which a plaintiff can make a *prima facie* case. *See generally* B. Schlei & P. Grossman, Employment Discrimination Law 153-154 (2d ed. Supp. 1983).

quirement imposes upon the defendant the burden of producing evidence "that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Burdine, supra*, 450 U.S. at 254.

Although this evidence must be "legally sufficient to justify a judgment for the defendant," *id.* at 255, it is merely one of production, not one of persuasion. *See Sweeney v. Board of Trustees of Keene State College*, 439 U.S. 24 (1978) (*per curiam*); *Krodel, supra*, 748 F.2d at 705; *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011-1012 (1st Cir. 1979). If the defendant fails to meet this burden, however, the plaintiff must prevail *if* he or she has made out a proper *prima facie* case and the District Court believes the plaintiff's evidence. *See Burdine, supra*, 450 U.S. at 254. *See also Cuddy, supra*, 694 F.2d at 857 n.21; *Nanty v. Barrows Co.*, 660 F.2d 1327, 1331-1332 (9th Cir. 1981). The purpose of placing this burden on the defendant is "simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Burdine, supra*, 450 U.S. at 255-256.

If the defendant carries its burden of production, the plaintiff must then carry his or her overall burden of persuasion in order to prevail. The plaintiff may carry this burden either indirectly by showing that the reason proffered by the defendant was in fact a pretext or directly by showing that it was more likely than not that the defendant was actually motivated by discrimination. *See id.* at 256. If the plaintiff fails to carry this burden, the plaintiff will lose.

Underlying the three-part approach of *McDonnell* and *Burdine*, therefore, is the ultimate question of the case: whether the defendant illegally discriminated against the plaintiff. In ADEA cases this question takes the form of whether age was a determining factor in the dis-

puted employment decision. *See Krodel, supra*, 748 F.2d at 706. And, as the Supreme Court has recently noted, courts must not become so enchanted with the structure of *McDonnell-Burdine* that they lose sight of this ultimate question:

> The "factual inquiry" in a Title VII case is "[whether] the defendant intentionally discriminated against the plaintiff." * * * The prima facie case method established in *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." * * * Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff." * * *

U.S. Postal Service Board of Gov. v. Aikens, 460 U.S. 711, 715 (1983) (brackets in original; citations and footnotes omitted). At this point, observed the Supreme Court, "the district court must decide which party's explanation of the employer's motivation it believes." *Id.* at 716. Thus, as the Supreme Court noted in *Aikens*, the *McDonnell-Burdine* structure and the issues it addresses do not mean "that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *Aikens, supra*, 460 U.S. at 716. *See also Molerio v. FBI*, 749 F.2d 815, 823 (D.C. Cir. 1984).

Our task in reviewing a judgment entered in the District Court is well established. First, we must assure ourselves that the District Court discerned and applied the proper legal standard. Next, we must review the District Court's factual findings and application of the legal standard to the facts found. The legal questions

are *de novo* questions for the reviewing court. The factual questions, however, are reviewed according to the clearly erroneous standard. *See* Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer City, N.C.*, —— U.S. ——, ——, 105 S.Ct. 1504, 1511 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-288 (1982); *Krodel, supra*, 748 F.2d at 706.

With respect to the question whether factual findings are clearly erroneous, this court noted in *Case v. Morrisette*, 475 F.2d 1300, 1307 (D.C. Cir. 1973), that "a finding is 'clearly erroneous' if it is without substantial evidentiary support or if it was induced by an erroneous application of the law." (Footnotes omitted.) Further, even if there is some evidence supporting a finding, that finding is clearly erroneous if "on the entire evidence [the reviewing court] is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). *See also Morrisette, supra*, 475 F.2d at 1307-1308. Clearly erroneous review, however, is not *de novo*. As the Supreme Court recently observed, "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson, supra*, —— U.S. at ——, 105 S.Ct. at 1512.

In reviewing a District Court's findings of fact with respect to discriminatory intent, therefore, we proceed under the clearly erroneous standard. Specifically, if the District Court has found that the defendant did act with the requisite discriminatory intent, we review that ultimate finding (and the subsidiary findings that support it). *See Anderson, supra*. If the District Court has not so found, however, the District Court, if it has proceeded correctly under *McDonnell-Burdine*, will have found that the defendant acted for a legitimate, nondiscriminatory

reason. In that case, it is this finding of fact (and its subsidiary findings) that we must review.[4] In reviewing such a finding, of course, we will examine whether it has sufficient evidentiary support. If it does, and if we are not otherwise convinced that the finding is clearly erroneous, we must affirm the District Court.[5] If it does not, however, the finding of a legitimate, nondiscriminatory motive is clearly erroneous and must be reversed. Further, under these circumstances judgment for the plaintiff will, in most cases, be mandated as a matter of law since the "legally mandatory, rebuttable presumption," *Burdine*, *supra*, 450 U.S. at 254 n.7, that arose when the plaintiff made out his or her *prima facie* case will never have been properly rebutted.[6]

In sum, our review of a District Court's factual findings with respect to discriminatory intent is conducted under the normal clearly erroneous analytical framework for reviewing findings of fact. Within this framework, however, our review will ensure, albeit indirectly, that the objectives of the *McDonnell-Burdine* structure have

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[4] As noted above, where the plaintiff has proceeded according to the *McDonnell-Burdine* structure, the duty of the District Court, after all the evidence has been presented, is to decide which party's version of the defendant's motivation it believes. Accordingly, if the District Court believes the defendant's version, it must make a finding of fact to that effect—that is, a finding that the defendant acted for whatever legitimate, nondiscriminatory reason regarding which it produced evidence. A bare finding that the defendant did not act for a discriminatory reason or that the plaintiff did not show that the defendant did act for a discriminatory reason will not suffice.

[5] We must assure ourselves as well that the plaintiff had notice and opportunity to show pretext. *See U.S. Postal Service Board of Gov. v. Aikens*, 460 U.S. 711, 716 n.5 (1983).

[6] Obviously, judgment for the plaintiff will not be appropriate where that presumption never arose due to the plaintiff's failure to make out a *prima facie* case.

been met in a particular case. Review of a finding of discriminatory intent will ascertain whether the plaintiff met his or her overall burden of persuasion. Conversely, review of a finding of no discriminatory intent will ascertain whether the defendant's burden was properly met.[7] These inquiries, however, are accomplished through the primary vehicle of clearly erroneous review rather than the after-the-fact inquiry into the intermediate *McDonnell-Burdine* steps rejected in *Aikens*. With this overall approach squarely in mind, we turn to the specific questions at hand.

III. Review of the District Court Decision

It is clear from the District Court's opinion in this case that it applied the proper legal standard: whether age was a determining factor in GSA's decision not to hire Cuddy. *See* 580 F.Supp. at 791. Thus we turn to the questions regarding the actual decision in favor of GSA. We must now determine whether the District Court's factual finding that, ultimately, Cuddy did not show illegal discrimination—specifically, that GSA acted for a legitimate, nondiscriminatory reason—was clearly erroneous.

A. *The Evidence Presented at Trial*

At trial, the disputed evidence concerned the GSA consideration of the applicants for the position in question and the GSA reasons for selecting Daley for the position and rejecting Cuddy. Cuddy testified that he had met with both Treichel (the selecting official) and Treichel's assistant and had discussed with them his certification

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[7] Clearly erroneous review, however, merely assures us that the defendant's burden was met. It does not require that the defendant have met it. That is, if there is evidence sufficient to support a finding that the defendant acted for a legitimate, nondiscriminatory reason, it matters not who introduced that evidence.

for the position and his qualifications for the job. These discussions took place before the selection of Daley. *See* Tr. at 31-33. Cuddy also testified that he had given a copy of his application/qualifications form directly to Treichel. *See id.* at 32. He further testified that after the selection he had gone to talk to Treichel. At that meeting, Cuddy testified, Treichel had explained that the position had been filled, that he had been directed by his supervisors to choose a younger man for the job, and that his own job would have been in jeopardy if he had resisted. *See id.* at 33, 260. Finally, Cuddy introduced evidence to the effect that Treichel knew his age (which was on his application), *see id.* at 43-44; *see also* Plaintiff's Exhibit No. 8, Appendix to Brief for Appellant (App.) at 20; that Treichel had stated in an earlier affidavit that "[a]ge I believe is a minor consideration to selection but it is not the sole factor," *see* Tr. at 56; *see also* Plaintiff's Exhibit No. 10A, App. 23-24; and that GSA seemed to emphasize hiring younger employees, given that it recruited on university campuses, *see* Tr. at 62; *see also* Plaintiff's Exhibit No. 11, App. 27.[8]

GSA then introduced evidence regarding Treichel's actions in selecting Daley for the position. First, Treichel testified that he could not recall considering Cuddy's application for the position. *See* Tr. at 200; *see also* Plaintiff's Exhibit No. 10A, App. 23.[9] He also testified that he

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[8] Cuddy also introduced into evidence a copy of a letter sent to him by GSA informing him that "[a]ll the eligible candidates on the [CSC] certificate were considered along with Federal employees who applied," and that he had not been selected. Plaintiff's Exhibit No. 3, App. 13.

[9] Treichel said he could not remember seeing the CSC list and the in-house list simultaneously. *See* Tr. at 211; Plaintiff's Exhibit No. 10A, App. 23. He did indicate, however, that he might have seen the CSC list and/or Cuddy's application at some point either before or after the selection was made. *See* Tr. at 211-212, 235. On cross-examination he said he

had selected Daley for the position because Daley could be immediately productive given his familiarity with GSA operations. *See* Tr. at 193-195; *see also* Plaintiff's Exhibit No. 10A, App. 24. Finally, Treichel stated that, if he *had* considered Cuddy's application, he would still have chosen Daley because Cuddy's experience was inferior to Daley's. *See* Tr. at 200.

On cross-examination and on rebuttal (Cuddy testifying), Cuddy tried to show that Daley had been involved in another project for at least six months after the selection—an involvement that prevented Daley from immediately assuming his new responsibilities fully. *See* Tr. at 215-217.[10] Cuddy also indicated that he, on the other hand, would have been immediately available. *See* Plaintiff's Exhibit No. 29, App. 62. Treichel responded, however, by testifying that the project in which Daley was involved was in fact part of the work of Treichel's section at the time. *See* Tr. at 217-219; *see also* testimony of Robert Daley, *id.* at 248-249. Cuddy also tried to show that his private experience was very similar to experience with the federal system and that Daley's experience would

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did remember that he did not see the two lists simultaneously. *See id.* at 213.

The other evidence going to the question whether Treichel saw the two official lists does not help to clarify the situation. As the District Court noted, "Schoenfelder testified that he sent the Certificate of Eligibles to Treichel along with the referral of federal candidates." 580 F.Supp. at 792. But the evidence also showed that "Schoenfelder returned the original Certificate to CSC on May 20, 1975 (retaining a copy for 'possible later reactivation'), that the selection panel met on May 20 to consider federal applicants, and that the selection of a federal applicant was made on June 5, 1975." *Id.*

[10] This project was the so-called "10/7 conversion" project in which the entire federal telecommunications system was altered to allow seven-digit dialing where it had previously required ten-digit dialing. This was admittedly a massive enterprise. *See Cuddy v. Carmen, supra* note 1, 694 F.2d at 855 n.5. *See also* Tr. at 188-192.

thus not have been more advantageous to GSA. *See generally id.* at 201-211, 260-263. Finally, Cuddy introduced evidence of a statement made by the GSA Equal Employment Opportunity officer that age had been a selection factor. *See* App. at 22a.

B. *The District Court's Findings*

Applying the *McDonnell-Burdine* structure to the evidence presented, the District Court concluded that Cuddy had made out a *prima facie* case and that the defendant had successfully carried its burden of producing evidence of nondiscriminatory intent. The court noted in this context that

> Albert Treichel testified that plaintiff's experience was not oriented towards the work of the VOB [Voice Operations Branch], in that since VOB was handling the "10/7 conversion," [11] he needed someone to keep up with daily activities and to become immediately productive. Treichel testified further that a person with Cuddy's experience would need a considerable amount of training in the specialized area of federal telecommunications.

580 F.Supp. at 791-792. The court went on to conclude that Cuddy's scattered evidence of statements by Treichel and by the GSA EEO Director and of Cuddy's own qualifications and Daley's lack thereof were insufficient to show that the reason advanced by GSA for Cuddy's nonselection was pretextual and that, consequently, Cuddy had not carried his burden of persuasion.

The District Court's crucial finding relevant to GSA's decisionmaking processes was the finding that

> Treichel did not select Cuddy for the GS-13 Communications Specialist position because his experience was not oriented towards the work of the VOB and because he felt that it would have been necessary to

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[11] *See* note 10 *supra*.

> provide a considerable amount of training for an individual with Cuddy's experience. In essence, Treichel concluded that Mr. Cuddy was unfamiliar with the specialized nature and function of the government's telecommunications system.

Id. at 791. The District Court also found that "[t]he reason for the plaintiff's nonselection had nothing to do with his age." *Id.*

The court, in addition to enumerating the findings above, also observed that "the evidence indicate[d] that it [was] quite possible that plaintiff's name was never referred to Treichel for consideration." *Id.* at 792. In support of this observation, the District Court noted Treichel's testimony that he could not remember ever having seen the certificate at the time the selection was made. Further, the evidence of when and to whom the certificate was sent indicated that it might not have officially been sent to Treichel prior to his making the selection. With respect to the relevance of this evidence to Cuddy's discrimination claim, the District Court concluded that "an error may have occurred in the selection process, but there is nothing to show that it rises to the level of discrimination." *Id.*

C. *Review of the District Court Findings Under the Clearly Erroneous Standard*

1. *Finding that GSA selected Daley because he was the best qualified applicant.* As summarized above, Treichel testified that he selected Daley because Daley was the most qualified applicant. He also testified that, although he did not recall considering Cuddy's application at the time he made the selection, he would not have chosen Cuddy because of his inferior experience and qualifications. There was additional testimony that Treichel had seen and was familiar with Cuddy's application prior to the time the selection was made. There was also evidence, however, that the CSC certificate of eligibles was in fact

not before Treichel for official consideration when he selected Daley for the position.

With respect to this evidence, the District Court made two apparently alternative findings. First, it found that GSA had rejected Cuddy because of his inferior qualifications. Examining the evidence, we conclude that this finding was not clearly erroneous..

From the evidence, one might reasonably infer that Treichel, although he did not officially consider Cuddy's application, did informally and effectively consider it in making his selection for the position. That is, because he was aware of Cuddy's qualifications he considered Cuddy at the time he considered Daley, even though Cuddy's application was not officially before him. Building on this permissible inference, the next question is whether the additional evidence adequately supports a conclusion that Treichel acted for the legitimate, nondiscriminatory reason of Cuddy being less qualified for the job.

Treichel testified that he chose Daley because Daley was the best qualified of the applicants. He also testified that, *if he had considered Cuddy's application*, he would not have selected Cuddy because of Cuddy's lack of relevant experience. This latter testimony alone would clearly be insufficient evidence of what the defendant's motivation here actually was: The question at hand is the *actual* reason for the employment decision—not some *hypothetical* nondiscriminatory reason that an employer submits after the fact.[12] The former evidence, however,

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[12] This point is supported by the case law regarding the defendant's *McDonnell-Burdine* burden. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (defendant must produce "evidence that the plaintiff *was* rejected, or someone else *was* preferred, for a legitimate, nondiscriminatory reason" (emphasis added)). *See also Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 97 (6th Cir. 1982); *Nanty v. Barrows Co.*, 660 F.2d 1327, 1332 (9th Cir. 1981). The purpose of the *McDonnell-Burdine* allocation of burdens

Treichel's testimony that he did in fact select Daley because Daley was the best qualified for Treichel's needs, supports a reasonable inference that Treichel in fact did not select Cuddy because Cuddy's qualifications were inferior to Daley's: Assuming that Treichel considered Cuddy and Daley concurrently, the fact that he determined Daley to be the best qualified applicant clearly supports an inference that he determined Cuddy to be less qualified than Daley.

Thus there was evidence supporting the District Court's finding that GSA rejected Cuddy because of his inferior qualifications. And we believe that this evidence, although far from overwhelming, is substantial enough to support the finding. Further, Cuddy's evidence that GSA's articulated reason here was a pretext is not weighty or convincing enough to topple the somewhat precarious tower of inferences supporting the finding of the District Court.

Cuddy's evidence of remarks made by Treichel is either capable of being discounted (because it meant little in the context) or of being disbelieved. Thus, although Cuddy testified that Triechel spoke of being pressured to choose the younger candidate, Treichel's own testimony indicated that he had never made representations to that effect to Cuddy. *See* Tr. at 197-198. Further, although Cuddy attempted to show that Daley was in fact not immediately available, that Cuddy's own experience was entirely transferable to the GSA operations, and that Daley's experience was actually less extensive than Cuddy's, this evidence was confused and far from convincing. It was not clear that Daley's continued participation in the 10/7

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is to focus the issues so as to enable the plaintiff to effectively try to show pretext. *See Burdine, supra,* 450 U.S. at 255-256. Allowing an employer to meet its *McDonnell-Burdine* burden by testifying to possible legitimate reasons for employment decisions, whether or not those reasons were the actual motivation behind the disputed decisions, would clearly circumvent this purpose. *See Rowe, supra,* 690 F.2d at 97.

project after his selection actually kept him from full participation in his new duties; it may have been that his participation in the 10/7 project was in some manner part of those duties. In addition, no clear picture emerges of how the relative backgrounds of Cuddy and Daley actually prepared them for the job in question. Finally, the statements about age being a factor could be found to be either not very potent when taken in context or not directly relevant to what actually happened in this case. *See* Tr. at 227-229, 236; 580 F.Supp. at 792. In sum, we cannot say that the District Court's finding that Cuddy was rejected because of his inferior qualifications was clearly erroneous. It finds "substantial evidentiary support," *Morrisette, supra*, 475 F.2d at 1307, in the record, and we are not left with the firm conviction that it was incorrect.

2. *Apparently alternative finding that GSA acted in nondiscriminatory fashion because Cuddy's nonselection resulted from a bureaucratic foulup.* Given the ambiguous nature of Treichel's testimony regarding his consideration (or lack of consideration) of Cuddy's application, however, an inference contrary to that drawn to support the District Court's primary finding is also possible.

Specifically, one could also permissibly infer that Treichel, although he knew *informally* of Cuddy's application, never *officially* considered Cuddy for the position. From this, and from the other evidence regarding the official handling of Cuddy's application, one might permissibly infer that evidence existed in the record to support the conclusion that Cuddy was rejected because his application was prevented from being effectively considered by a bureaucratic foulup.

Based apparently on this inference, the District Court concluded, in an alternative finding to its main one discussed above, that judgment for GSA would be proper under this alternative scenario as well. Although not

stated explicitly, the District Court apparently based this conclusion on a finding that a GSA bureaucratic error caused Cuddy's rejection.

To support the District Court's ultimate conclusion, however, the finding would have to include a finding that the error was nondiscriminatory.[13] But, in fact, no evidence was introduced as to the reasons for the delay in consideration of in-house candidates or the rejection of the CSC candidates prior to that consideration. Thus no affirmative evidence that the bureaucratic error was nondiscriminatory was present in the record.[14] Consequently, the alternative finding is clearly erroneous. Further, given that Cuddy, by making out a *prima facie* case of discrimination,[15] had created a presumption of discriminatory intent which was not rebutted by evidence of a legitimate, nondiscriminatory reason, Cuddy would, under this alternative rationale, prevail on the ultimate question of discrimination.

Although we strongly deprecate use of alternative factual findings by a District Court and the underlying lack of clarity of the evidence presented here by GSA,[16]

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[13] As noted previously, the District Court's finding here that nothing indicated that the foulup was discriminatory is not a sufficient factual finding. *See* note 4 *supra*.

[14] *Cf. Rowe, supra* note 12, 690 F.2d at 96-97 (noting that reason given by employer for refusal to rehire plaintiff—that employer's foreman did not want to rehire him—was inadequate to meet *McDonnell-Burdine* burden, as foreman's inclination may have resulted from either discriminatory or nondiscriminatory motives).

[15] As the District Court found here, Cuddy did present a *prima facie* case: (1) Cuddy was 64 years old in 1975; (2) he was qualified—as shown by his certification for the position by CSC, *see* Tr. at 172; (3) he was not hired; and (4) Daley, aged 37, was selected.

[16] In particular, we are troubled by the fact that the evidence in a sense presented Cuddy with two potential nondis-

we do not believe that the evidence here was so unclear as to warrant a determination that Cuddy never had effective notice of GSA's articulated nondiscriminatory reason and of his obligation to show that it was pretextual. Nor, even given the somewhat ambiguous nature of the District Court's findings, are we firmly convinced that a mistake has been made. Consequently, we uphold the District Court's judgment for GSA.

IV. Conclusion

The District Court in this case properly discerned and applied the governing legal standard. Further, we have reviewed the evidence and the District Court's findings of fact, and we are unable to say that they are clearly erroneous. Thus, we affirm the judgment in favor of GSA.

Affirmed.

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criminatory reasons to address. (This is true even though we have concluded after the fact that one had inadequate evidentiary support.) This presentation of alternative scenarios by a defendant is problematic because it could undermine the *McDonnell-Burdine* structure. As noted above, *see* note 12 *supra*, a major purpose of that structure is to enhance the plaintiff's ability to prove his or her case by requiring the defendant to provide an explanation of its action around which indirect proof of discrimination can center (proof of pretext). But if defendants may introduce alternative reasons, a plaintiff's ability to focus his or her proof is undermined, much as may occur if defendants are allowed to introduce hypothetical reasons.

Appendix 2A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM H. CUDDY,
Plaintiff

v.

GERALD P. CARMEN, *Administrator*
General Services Administration
Defendant

Civil Action No. 79-1249

JUDGEMENT

This cause having come on for trial before the Honorable John Garrett Penn and a jury and the issues having been duly heard and a decision having been duly rendered on July 29, 1981. On December 3, 1982, the United States Court of Appeals reversed and remanded the action for further proceedings and the parties agreed to rely on the record established at the prior trial and made no request to submit further evidence and a Memorandum, Findings of Fact and Conclusions of Law having been rendered on February 6, 1984, it is

ORDERED AND ADJUDGED that judgement be entered for defendant, Gerald F. Carmen, Administrator of General Services Administration, and against plaintiff, William H. Cuddy.

JAMES F. DAVEY, Clerk
/s/ By: Patricia M. Hayden
Deputy Clerk

By direction of:

JOHN GARRETT PENN
Judge

Appendix 3A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1211

WILLIAM H. CUDDY, APPELLANT

v.

GERALD P. CARMEN, Administrator,
General Services Administration

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 79-01249)

Argued September 13, 1982

Decided December 3, 1982

William H. Cuddy, pro se.

Diane M. Sullivan, Assistant United States Attorney, with whom *Stanley S. Harris*, United States Attorney, and *Royce C. Lamberth* and *R. Craig Lawrence*, Assistant United States Attorneys, were on the brief, for appellee. *Kenneth M. Raisler*, Assistant United States Attorney, entered an appearance for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before ROBINSON, *Chief Judge*, and WRIGHT and WALD, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: William H. Cuddy, appellant, sued the General Services Administration (GSA), appellee, on the ground that it willfully and knowingly discriminated against him on the basis of age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* (1976 & Supp. IV 1980). The District Court, over the government's objection, ordered the case to jury trial. The court instructed the jury that plaintiff had the burden of proving by a preponderance of the evidence that age was the "determining" factor in defendant's decisionmaking. The jury returned a verdict in favor of the government.

Cuddy appeals the adverse jury verdict, contending that the District Court erroneously instructed the jury regarding the standard for proving an ADEA violation and that the preponderance of the evidence, despite the jury's verdict, was in his favor. The government disputes both contentions, and also argues that the District Court erred in ordering the case to jury trial. Because we agree that the case should not have been tried to a jury, we remand to the District Court for entry of findings of fact and conclusions of law consistent with the principles set forth in this opinion.

I. THE FACTS

Appellant worked for 38 years in the private sector of the communications industry (for New England Telephone Company). In anticipation of his compulsory retirement (at age 65), appellant, who wishes to continue working for as long as his health permits, filed an application with the federal government (in 1966) for a position as a telecommunications specialist. At that time, he received his first Civil Service Commission (CSC)

rating—GS-13.[1] He renewed his eligibility each year thereafter, and he made repeated inquiries into openings whenever they were announced by CSC.[2]

In 1975 appellant was placed on the Certificate of Eligibles for a GS-13 communications specialist position. In February of that year, the Automatic Data and Telecommunication Service (ADTS), a component part of GSA, advertised a GS-13 communications specialist position. Appellant diligently contacted persons at GSA to assure his consideration for this position. First, he visited Mr. Robert Schoenfeld, a Personnel Management Specialist at GSA, who explained the CSC certification process. Second, he returned his signed certification for the position to Mr. Schoenfeld. Third, he visited with Mr. Schoenfeld and discovered that he was among three remaining outside candidates eligible for the job, and that only six persons total were up for consideration.[3] Fourth, he met with the hiring supervisor, Mr. Albert

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[1] The GS-13 level qualified appellant for senior-level communications specialist positions. Non-government employees must take the CSC exam to qualify for positions as outside CSC applicants.

[2] Appellant applied for positions in Boston, New York, and Washington. The positions in Boston and New York were on the mid-level register, but appellant applied because of the known difficulty of being certified for senior-level positions. Brief for appellant at 3. Appellant asserts that he was discriminated against several times, but that he had no cause of action since these acts occurred before the ADEA was amended to allow suits against the government. *See* note 17 *infra* and accompanying text.

[3] Originally, there were six outside candidates. But two candidates declined consideration for the position and one failed to respond to the notice of availability. Only three names were forwarded to the agency's merit promotions panel. Brief for appellee at 2-3. There were also three career government employees eligible, for a total of six.

Treichel, and other GSA officials several times before the final decision was made.[4]

Appellant's signed certification was forwarded, along with the names of the other eligible candidates, to Mr. Treichel on May 20, 1975. On May 22 the agency's merit promotions panel referred the names of the highest and best qualified applicants to Mr. Treichel. On June 5, 1975 Mr. Treichel selected Mr. Robert Daley, a current employee of GSA, for the position.

Appellant claims that GSA discriminated against him because of his age. In 1975, when he applied for the position, appellant was 64 years old—27 years older than the ultimate selectee. During appellant's long career, which included four years as a Signal Officer in World War II, he had been a supervisor in plant assignments and operations, a specialist in planning systems cutovers, and a coordinator of other Bell System departments with his department's operations. In applying for government jobs he had scored 101/104 points—the highest of all six eligible candidates—on the civil service exam. By contrast, Mr. Daley, the ultimate selectee, had about fifteen years of private sector experience (most as a cable splicer and repairman), fourteen months of non-supervisory experience as a GS-12 communications specialist, and about a year as manager of the government's "10/7 conversion" project.[5] Mr. Daley was the youngest of all the

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[4] These meetings apparently occurred on April 2, 1975, April 17, 1975, May 27, 1975, and May 28, 1975. Brief for appellant at 12.

[5] The "10/7 conversion" is a project to improve the government telecommunication system, and involves a change from 10-digit to 7-digit dialing. Over 100 federal agencies and one million telephones are involved, and the project consists of transferring over 55 major switches and 2,000 subsidiary switches.

candidates,[6] was next to the lowest in job rating,[7] and, along with appellant, had the lowest performance rating.[8]

GSA initially asserted that appellant was equally considered for the communications specialist position.[9] Later, Mr. Treichel, the hiring supervisor, claimed that he did not remember seeing appellant's certificate of eligibility at the time he made the selections, and therefore that he could not purposefully have discriminated against appellant.[10] But Mr. Treichel did admit to being aware of appellant's age and background (from their earlier meeting),[11] and openly conceded that "[a]ge is a minor consideration to selection, but is not the sole motivating factor." [12] He testified that he selected Mr. Daley for the position because the latter was familiar with GSA operations, could be immediately productive, and would require the least amount of training.[13] But Mr. Joseph Daniel, Director of GSA's Equal Employment Opportunity Division, reported that he could not agree with the decision because age "was in fact a selection factor." [14]

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[6] Besides appellant, the other four candidates ranged from 40 to 52 years in age.

[7] Selectee's rating was a 46; appellant's was only a 42. The four other candidates had ratings of 48, 50, 52, and 53.

[8] Selectee and appellant were rated 2 on the performance factor. The other candidates were rated 4, 5, 5, and 8.

[9] *See* Letter from H. Gray, Acting Personnel Director, to W. H. Cuddy (Aug. 18, 1975) ("We have considered your qualifications for a recent GS-393-13 Communications Specialist position."), Appendix (App.) at 11.

[10] App. at 21.

[11] App. at 24.

[12] App. at 23-24.

[13] App. at 24.

[14] App. at 22a.

At trial the District Court, over the government's objection, ordered the case to a jury. The court instructed the jury that:

> In order to prove his claim of age discrimination the burden is on the plaintiff to establish by the preponderance of the evidence, as I have already explained that term to you, that he was discriminated against by the Defendant because of his age and that as a result he was not selected for the position of a Communications Specialist GS-13.
>
> Now, the Plaintiff's claim, as I said, is that he was not selected because the Defendant considered him to be too old and preferred a younger person and that such action constitutes prohibited discrimination.
>
> Ladies and gentlemen, if you find the Plaintiff's age was the determining factor considered by the Defendant in its decision to select someone other than the Plaintiff then you are entitled to find that the Defendant discriminated against the Plaintiff by virtue of age. On the other hand, if you find that the Defendant made its decision to appoint someone other than the Plaintiff to the position in question for a reason or reasons other than age of the Plaintiff and the age of the Plaintiff was not the determining factor in that selection then your verdict must be for the Defendant.

Following this instruction, the jury returned a verdict for the government, finding that no violation of the ADEA had been proved.

II. Proof of ADEA Violations

Congress passed ADEA in 1967 to protect older members of the nation's workforce from discrimination premised on age differences.[15] *Lorillard v. Pons*, 434 U.S.

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[15] Congress sought to prohibit "arbitrary age discrimination." *See* 29 U.S.C. § 621(a)(2), (4) (1976) ("Congress hereby finds and declares that * * * (2) the setting of arbi-

575, 577 (1978). As originally enacted, ADEA applied only to employees in the private sector; it prohibited employers from taking adverse employment action "because of" a protected worker's age.[16] 29 U.S.C. § 623 (Supp. IV 1980). In 1974 Congress amended ADEA to bring federal employees and applicants for federal positions under the Act's protective umbrella.[17] Section 633a requires federal employment decisions to "be made free from any discrimination based on age." 29 U.S.C. § 633a (Supp. IV 1980). This section did not change the standard for establishing an ADEA violation, but simply extended the procedures and remedies available for vindi-

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trary age limits regardless of potential for job performance has become a common practice * * *; (4) the existence * * * of arbitrary discrimination in employment because of age burdens commerce * * *."). In the hearings on ADEA, Secretary of Labor Wirtz stated: "It is made clear throughout the Bill that the prohibition is of 'discrimination' in the sense of 'arbitrary age discrimination' * * *." *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 36, 39 (1967).

For further discussions of the problems of age discrimination and of the efforts Congress took to remedy these problems, *see Legislative History of the Age Discrimination in Employment Act*, U.S. Equal Employment Opportunity Commission (1981) (EEOC compilation of ADEA's entire legislative history). *See generally* 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION §§ 98.10-.53 (1981); Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982); Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380 (1976).

[16] The Act protects workers who are between the ages of 40 and 70. 29 U.S.C. § 631(a) (Supp. IV 1980). It extends its prohibition to refusals to hire as well as to discharges and other forms of discrimination. 29 U.S.C. § 623(a)(1) (1976).

[17] This explains why appellant could not pursue the alleged overt discrimination that occurred in Boston and New York before 1974. *See* note 2 *supra*.

cating age discrimination claims to employees of and applicants to the federal government.[18]

To make out a prima facie case of age discrimination against either government or private employers, a plaintiff must demonstrate facts sufficient to create a reasonable inference that age discrimination was "a determining factor" in the employment decision.[19] Such an in-

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[18] *See* S. Rep. No. 93-690, 93d Cong., 2d Sess. 251-252, *reprinted in* [1974] U.S. Code Cong. & Ad. News 2811, 2849-2850 ("The committee expects that expanded coverage under the Age Discrimination in Employment law will remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as it has and continues to do in private employment.").

[19] While this court has not squarely addressed the question, other circuits have uniformly decided that an ADEA plaintiff must prove that age was "a determining factor" in the employment decision challenged. *See, e.g., Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979) (ADEA plaintiff must prove that age was "determining factor" in adverse employment decision); *Bentley v. Stromberg-Carlson Corp.*, 638 F.2d 9, 12 (2d Cir. 1981) (same); *Smithers v. Bailar*, 629 F.2d 892, 897 (3d Cir. 1980) (same); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112 (4th Cir. 1981) (same); *Marshall v. Airpax Industries, Inc.*, 595 F.2d 1043, 1044 (5th Cir. 1979) (same); *Laugeson v. Anaconda Co.*, 510 F.2d 307, 316-317 (6th Cir. 1975) (same); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1222 app. (7th Cir.), *cert. denied*, 450 U.S. 959 (1981) (same); *Tribble v. Westinghouse Electric Corp.*, 669 F.2d 1193, 1196 (8th Cir.), *petition for cert. filed*, 50 U.S.L.W. 3984 (U.S. May 29, 1982) (same); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984 (9th Cir. 1981) (same); *Kentroti v. Frontier Airlines, Inc.*, 585 F.2d 967, 974 (10th Cir. 1978) (same) (by implication); *Anderson v. Savage Laboratories, Inc.*, 675 F.2d 1221, 1224 (11th Cir. 1982) (same).

This "determining" factor standard can be found in the legislative history. *See* S. Rep. No. 723, 90th Cong., 1st Sess. 7 (Nov. 4, 1967) ("The purpose of this legislation, simply stated, is to ensure that age, within the limits prescribed herein, is not a determining factor in a refusal to hire."). *See also* 113 Cong. Rec. 31255 (1967) (statement of Sen. Javits); S. Rep. No. 95-493, 95th Cong., 1st Sess. 2, 3, *re-*

ference is created if the plaintiff shows that he (1) belongs to the statutorily protected age group (40-70), (2) was qualified for the position, (3) was not hired, and (4) was disadvantaged in favor of a younger person.[20] *See Sutton v. Atlantic Richfield Co.*, 646 F.2d 407 (9th Cir. 1981); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979). *Cf. Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (analogous elements under Title VII); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (same). Once a prima facie case has been established, the employer has the burden of producing evidence tending to show that the applicant was denied employment for a legitimate, nondiscriminatory reason.[21] If the employer does so, and if his evidence is credible, the plaintiff must show by a preponderance of the evidence that the employer's asserted legitimate reason is merely pretextual. *See, e.g., Tribble v. Westinghouse Electric Corp.*, 669 F.2d 1193, 1196 (8th Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3984 (U.S. May 29, 1982); *Douglas v. Anderson*, 656 F.2d 528, 533 (9th Cir. 1981). Once this stage is reached, the order and allocation of proof has served its purpose of bringing "the

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printed in [1978] U.S. Code Cong. & Ad. News 504, 506. The Department of Labor has consistently interpreted the statute to ensure that age was not a "determining" factor in employers' decisions. 29 C.F.R. § 860.103(c) (1981).

[20] A prima facie case raises an inference of discrimination because the conduct at issue is presumed to be based on consideration of impermissible factors and, absent *any* evidence to the contrary, can also be presumed to be a "determining" cause of the discrimination. *See Smithers v. Bailar, supra* note 19, 629 F.2d at 895.

[21] *See Sutton v. Atlantic Richfield Co.*, 646 F.2d 407 (9th Cir. 1981); *Loeb v. Textron, Inc., supra* note 19; *cf. Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978). If the employer is silent and the trier of fact believes plaintiff's evidence, plaintiff is entitled to a directed verdict. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). But defendant's burden is only one of production, not of persuasion.

litigants and the court expeditiously to [the] ultimate question" of discrimination. *Burdine, supra*, 450 U.S. at 253. The plaintiff, who at all times retains the burden of persuasion, must then show by a preponderance of the evidence that age was "a determining factor" in the employer's decision.[22] In other words, plaintiff must

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[22] The District Court instructed the jury that plaintiff had to prove by a preponderance of the evidence that age was "the determining factor" in the employment decision. *See* text following note 14 *supra*. While our disposition of this appeal moots appellant's challenge to this instruction, the substitution of the definite article "the" for the indefinite article "a" carries the potential for serious misapplication of the Act. A plaintiff is entitled to prevail even though age is not the *sole* factor in the employment decision. *See Kelly v. American Standard, Inc., supra* note 19, 640 F.2d at 984-985; C. EDELMAN & I. SIEGLER, FEDERAL AGE DISCRIMINATION IN EMPLOYMENT LAW 188 & n.360 (1980). The District Court's use of the definite article "the" suggests that age must be the only, or at least the most important, factor in the decision. This implication is both incorrect and dangerous. A plaintiff need only show that age was "a determining factor" in the employment decision.

In a recent Third Circuit case, the District Court had found that age "was not the determinative factor," and appellant challenged the propriety of that standard for evaluating the evidence before it. *Smithers v. Bailar, supra* note 19, 629 F.2d at 896. The Court of Appeals considered appellant's argument that use of the word "the" was error and acknowledged that the District Court's formulation "would have been more clear if it had used the indefinite rather than the definite article." *Id.* Examining the entirety of the District Court's findings, however, the court held that the opinion as a whole reflected that the District Court implicitly had applied the proper rule of law, as indicated by the trial court's elaboration of its analysis and citations to other cases in which the correct test was explained. *Id.* at 897. In the instant case, the District Court offered no such embellishment that might clarify for the jury what the court intended the standard to be. *See also Spagnuolo v. Whirlpool Corp., supra* note 19, 641 F.2d at 1111-1112 (rejecting employer's argument that failure to charge jury that "age must have been *the* determinative factor" constituted error) (emphasis in original).

prove by a preponderance of the evidence that age made a difference in the employer's decision not to hire him.[23]

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[23] The courts interpreting the standard of "a determining factor" have further explained it through various reformulations. *See, e.g., Loeb v. Textron, Inc., supra* note 19, 600 F.2d at 1019 ("determining factor" means that, but for motive to discriminate, employee would not have been discharged); *Bentley v. Stromberg-Carlson Corp., supra* note 19, 638 F.2d at 11-12 ("determining factor" means "factor that made a difference * * * in the sense that 'but for' his employer's motive to discriminate against him because of age, he would not have been discharged"); *Smithers v. Bailar, supra* note 19, 629 F.2d at 89 ("determining factor" means age "played a part" in decision, even if nondiscriminatory reasons were more compelling); *Spagnuolo v. Whirlpool Corp., supra* note 19, 641 F.2d at 1112 (determining factor means but for causation); *Haring v. CPC International, Inc.*, 664 F.2d 1234, 1239-1240 (5th Cir. 1981) (age consideration made a difference to decision, *citing Loeb v. Textron, Inc.*); *Laugeson v. Anaconda Co., supra* note 19, 510 F.2d at 317 (plaintiff may recover if age "made a difference" in the decision); *Kephart v. Institute of Gas Technology, supra* note 19, 630 F.2d at 1222 (determining factor means but for causation); *Cleverly v. Western Electric Co.*, 594 F.2d 638, 640 (8th Cir. 1979) (approving District Court's use of "in fact made a difference" reformulation); *Kelly v. American Standard, Inc., supra* note 19, 640 F.2d at 984 (determining factor means but for causation); *Kentroti v. Frontier Airlines, Inc., supra* note 19, 585 F.2d at 974 (*citing Laugeson*'s one factor that "makes a difference" reformulation); *Anderson v. Savage Laboratories, Inc., supra* note 19, 675 F.2d at 1224 (plaintiff must prove age consideration made a difference to decision).

Though the courts vary their reformulations slightly, we can discern no immediate logical difference between them. The notion of "but for" causation—or causation-in-fact—is a basic, threshold issue of plaintiff's action; an act is typically not regarded as a "but for" cause of an event if the event would have occurred without it. *See* W. PROSSER, LAW OF TORTS 236-241 (4th ed. 1971). Thus, the "but for" reformulation is no more than the traditional factual inquiry into whether consideration of the impermissible criterion made a difference toward causing the adverse action to occur.

These reformulations arise from the statutory scheme itself. Differentiation "because of" age is unlawful, 29 U.S.C.

The manner in which this order and allocation of proof becomes functional can be seen when applied to the facts of this case. Appellant established a prima facie case by showing (1) that he was 64 years old, (2) that he was certified for the position, (3) that he was not hired, and (4) that the ultimate selectee was only 37 years old. The employer then met its burden of producing evidence by showing legitimate reasons why the selectee was the best qualified: that the selectee was familiar with GSA operations, that the selectee could be immediately productive, and that the selectee would require the least amount of training. This shifted the burden back to plaintiff-appellant to show pretext and to carry the ultimate burden of persuasion. Appellant attempted to carry this burden with direct evidence that age was a selection factor—the statements of Mr. Treichel and Mr. Daniel—and with circumstantial evidence about his, the selectee's, and the other applicants' qualifications. The trier of fact then had to weigh this evidence and determine whether plaintiff had proven by the preponderance of the evidence that age was a determining factor in the decision.

The District Court submitted this question to a jury. The jury found that age was not a determining factor in the decision. But subsequent to the jury's verdict the Supreme Court ruled that, although a person who brings

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§ 623(a) (Supp. IV 1980), but not differentiation attributable to "reasonable factors other than age." 29 U.S.C. § 623(f)(1) (Supp. IV 1980). A transgression arises only if age contributed to the employer's action—so that the differential cannot be ascribed to influences "other" than age. If age is what tips the scale in an adverse employment decision, a violation of the Act has occurred. Conversely, if reasonable and lawful factors dictate and support the employer's decision, additional consciousness of age is not itself interdicted by the Act. The courts agree that age need not be the sole factor, or even the most compelling; it simply must be a consideration that made a difference in shaping the outcome. *See* C. EDELMAN & I. SIEGLER, *supra* note 22, at 188 & n.360.

an action against a private employer under ADEA *does* have the right to a jury trial, a *federal* employee or job applicant does *not* have that right. *Lehman v. Nakshian*, 453 U.S. 156, 165 (1981). This court, in *Johnson v. Lehman*, 679 F.2d 918 (D.C. Cir. 1982), held that there was no manifest injustice in applying *Nakshian* retroactively to that ADEA case.[24] For the reasons articulated in *Johnson*, we reach the same conclusion here. Therefore, the District Court erred in ordering the case to jury trial over the government's objection, and the jury's verdict must be vacated.

Whether appellant proved by a preponderance of the evidence that age was a determining factor in the employment decision is now properly a question for the court. On remand, the District Court must enter findings of fact and conclusions of law on this issue.[25] It can base these findings and conclusions on the trial record, or, in its discretion, it can ask for more evidence on the issue. In any event, when weighing the evidence the

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[24] *Nakshian* held that Congress did not intend "clearly and unequivocally" to confer a right to trial by jury on ADEA plaintiffs proceeding against the federal government. In *Johnson v. Lehman*, 679 F.2d 918 (D.C. Cir. 1982), this court did not address the issue whether this holding constituted a matter of a trial court's jurisdiction, *id.* at 920-921, which always requires retroactive application. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1980). Instead, it followed the well established rule that an appellate court will apply the law in effect at the time of decision, unless manifest injustice is threatened—the rule articulated in *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974). Like the *Johnson* court, we find no such threat.

[25] In this case, the hiring supervisor admitted that "[a]ge is a minor consideration to selection, but is not the sole motivating factor." App. at 23-24. The dispositive question on remand, therefore, should be whether this "minor consideration," together with all the other evidence, amounted to a factor that made a difference to the outcome.

District Court must keep in mind the difficulties plaintiffs face in proving ADEA violations. Employees and applicants for employment have great informational disadvantages: they cannot reach into the minds of decisionmakers, and therefore they usually can gather only circumstantial evidence of discriminatory motives.[26] Hence, the trier of fact should take special care to require of plaintiff only that he present sufficient evidence to allow a reasonable person to draw from it the inference of the fact to be proved. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 338 (2d ed. E. Cleary 1972). *See generally* Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129 (1980). Plaintiff-appellant should only have to show that age was a determining factor, as earlier defined, in the government's decision to hire someone else by a preponderance of the evidence.[27]

III. CONCLUSION

Because we find that the District Court erred in ordering the case to a jury, we remand for entry of findings of fact and conclusions of law consistent with the principles set forth in this opinion. In so remanding, we remind the District Court that ADEA is remedial and humanitarian legislation, and that it should be interpreted to effectuate the congressional purpose of ending age discrimination. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 765-766 (1978) (Blackmun, J., concurring).

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[26] Typically, they must rely on such evidence as differential treatment, inconsistent records, or statistical evidence of discrimination to create the necessary inferences. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1153-1155 (1976).

[27] This would satisfy the third prong of the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), test as it is applied to age discrimination cases.

The Act seeks to promote employment of older persons based on their ability rather than their age. Lower courts must be cognizant of this underlying policy in deciding whether plaintiffs have carried their ultimate burden, and such courts must be chary of creating walls too steep for meritorious claimants to climb.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Appendix 4A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA COURT

No. 84-5132 September Term, 1984
Civil Action No. 79-1249

William H. Cuddy, *Appellant*

v.

Gerald P. Carmen, *Administrator*
General Services Administration

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Before: ROBINSON, Chief Judge, and WRIGHT and WALD, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by the parties. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgement of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court
/s/ George A. Fisher
George A. Fisher
Clerk

Date: May 21, 1985
Opinion for the Court filed by Circuit Judge Wright.

Appendix 5A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5132 September Term, 1984
CA No. 79-01249

William H. Cuddy

v.

Gerald P. Carmen, *Administrator*
General Services Administration

BEFORE: Robinson, Chief Judge; Wright and Wald, Circuit Judges

ORDER

Upon consideration of the petition for rehearing of appellant William H. Cuddy, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT
GEORGE A. FISHER, CLERK
BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Filed: August 13, 1985

Appendix 6A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5132 CA No. 79-01249

William H. Cuddy

v.

Gerald P. Carmen, Administrator
General Services Administration

BEFORE: Robinson, Chief Judge, Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges.

ORDER

The suggestion for rehearing *en banc* of appellant William H. Cuddy has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT
GEORGE A. FISHER, CLERK
By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk